

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

**D.W., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NAVAL AIR  
DEPOT, Cherry Point, NC, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 14-248  
Issued: June 17, 2014**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Alternate Judge

MICHAEL E. GROOM, Alternate Judge

JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 15, 2013 appellant, through his attorney, filed a timely appeal from an October 8, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his schedule award claim. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant sustained permanent impairment of the right or left upper extremity.

**FACTUAL HISTORY**

This case has previously been before the Board. By decision dated November 4, 2010, the Board set aside a December 30, 2009 OWCP decision denying appellant's claim for a

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

schedule award.<sup>2</sup> The Board remanded the case for OWCP to refer the October 27, 2009 impairment evaluation from Dr. Martin Fritzhand, an attending Board-certified urologist, and to an OWCP medical adviser for review. In a decision dated April 15, 2013, the Board affirmed an October 24, 2012 decision finding that appellant was not entitled to a schedule award of the right or left upper extremity.<sup>3</sup> The Board determined that the January 3, 2013 report from Dr. Robert M. Moore, a Board-certified orthopedic surgeon and OWCP referral physician, constituted the weight of the evidence and established that he had no permanent impairment of upper extremity based on a spinal nerve root impairment. The facts and circumstances as set forth in the prior Board decisions are hereby incorporated by reference.

On May 18, 2013 appellant requested reconsideration. He submitted a May 18, 2013 report from Dr. Ashraf F. Guirgues, a Board-certified orthopedic surgeon, who discussed appellant's complaints of upper extremity numbness and pain in his neck and arm which he attributed to performing his work duties. Dr. Guirgues found that magnetic resonance imaging (MRI) scan studies revealed cervical degenerative changes with desiccation at C4-5, C5-6 and C6-7 and that electrodiagnostic testing did not "show any clear evidence of long-term nerve damage." He diagnosed cervical degenerative disc disease with herniations, radiculitis, stenosis and osteoarthritis of the facet joints and discs. Dr. Guirgues related that it was "difficult to establish a causal relationship between [appellant's] employment as a machinist and degenerative changes" without x-rays before he began working. He stated, "There is no specific research that deals with that job description that shows a direct causal relationship but [appellant] did not have symptoms prior to his employment as a machinist and so there is likely some causal relationship I cannot comment on that as there is no specific data to support any specific causation." Dr. Guirgues concluded that appellant had a three percent impairment rating under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009) (A.M.A., *Guides*).

On September 3, 2013 counsel argued that *The Guides Newsletter* of July to August 2009 (*The Guides Newsletter*) was "junk science" as it was "merely an opinion authored without scientific validity" and not subject to peer review. He asserted that the A.M.A., *Guides* at page 579 indicated that electromyogram (EMG) testing did not "always detect sensory root involvement" but *The Guides Newsletter* "calls for such testing as a predicate to a schedule award for spinal impairment."

By decision dated October 8, 2013, OWCP denied modification of its prior decision. It found that Dr. Guirgues' report was insufficient to establish that appellant sustained a permanent impairment of a scheduled member or function as the physician failed to specify whether his rating was for an extremity, the spine or the whole person.

---

<sup>2</sup> Docket No. 10-817 (issued November 4, 2010). On November 20, 2003 appellant, then a 50-year-old machinist, filed an occupational disease claim alleging that he sustained osteoarthritis and bone spurs on his neck causally related to factors of his federal employment. OWCP accepted the claim for an aggravation of cervical degenerative disc disease and an aggravation of osteoarthritis of the cervical spine.

<sup>3</sup> Docket No. 13-278 (issued April 15, 2013).

On appeal, counsel reiterated that *The Guides Newsletter* is not valid science and lacks peer review.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>4</sup> and its implementing federal regulations<sup>5</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>6</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>7</sup>

### **ANALYSIS**

The Board previously affirmed an October 24, 2012 decision denying appellant's claim for a schedule award for the right and left upper extremity. The Board found that the opinion of Dr. Moore, an OWCP referral physician, represented the weight of the evidence and supported that he had no impairment of the upper extremities as there was no demonstrated impairment of a spinal nerve root.

On May 19, 2013 appellant requested reconsideration and submitted Dr. Guirgues' May 18, 2013 impairment evaluation. Dr. Guirgues noted that electrodiagnostic testing showed no nerve damage and that an MRI scan study showed cervical degeneration and desiccation at C4-5 through C6-7. He asserted that he was unable to address whether the diagnosed conditions of cervical disc herniation, radiculitis, stenosis and osteoarthritis were causally related to appellant's employment in the absence of x-rays obtained before he began working. Dr. Guirgues noted that there was no research showing a causal relationship between work as a machinist and appellant's condition. Appellant had no symptoms prior to his work and thus there was "likely some causal relationship" but Dr. Guirgues could not provide an opinion on causal relationship. Referencing the A.M.A., *Guides*, Dr. Guirgues determined that appellant had a three percent impairment rating. As he failed to address the causal relationship between appellant's condition and factors of his federal employment, his opinion is of diminished probative value.<sup>8</sup> The mere fact that a disease or condition manifests itself during a period of employment does not raise an inference of causal relationship between the condition and the

---

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Id.* at § 10.404(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>8</sup> *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Conard Hightower*, 54 ECAB 796 (2003) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

employment.<sup>9</sup> Dr. Guirgues also failed to cite any specific tables or pages of the A.M.A., *Guides* in rating a three percent impairment or whether the rating was for an extremity, the back or the whole person. Consequently, his opinion is insufficient to show that appellant has an impairment of either upper extremity.<sup>10</sup>

On appeal, counsel argues that *The Guides Newsletter* did not undergo review by peers and is scientifically invalid. He notes that the A.M.A., *Guides* does not recommend the use of *The Guides Newsletter*. As noted, however, Dr. Guirgues did not find that appellant had an impairment as a result of his accepted September 4, 2003 employment injury. The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.<sup>11</sup> OWCP has adopted the sixth edition for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures which memorializes proposed tables outlined in *The Guides Newsletter* July to August 2009.<sup>12</sup> The Board has recognized OWCP's adoption as proper in order to provide a uniform standard applicable to each claimant for a schedule award.<sup>13</sup>

### **CONCLUSION**

The Board finds that appellant has not established that he is entitled to a schedule award for a permanent impairment of the right or left upper extremity.

---

<sup>9</sup> See *D.E.*, 58 ECAB 448 (2007); *Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>10</sup> See *I.F.*, Docket No. 08-2321 (issued May 21, 2009).

<sup>11</sup> See *Harry D. Butler*, 43 ECAB 859 (1992).

<sup>12</sup> FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

<sup>13</sup> See *e.g.*, *D.S.*, Docket No. 14-12 (issued March 18, 2014); *M.W.*, Docket No. 13-928 (issued August 15, 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 8, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 17, 2014  
Washington, DC

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board